



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Lacy G. Brown, Esq.
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Re: Freedom of Information Act Request No. EPA-HQ-2022-003394, Final Response

Dear Ms. Brown:

This letter concerns the above-referenced FOIA request, received by the U.S. Environmental Protection Agency (EPA or Agency) on March 30, 2022, modified via email on April 14, 2022. The request, as revised, requested the following:

1. The FOIA search for this request would be focused on custodians of responsive records in the Air Enforcement Division of the Office of Enforcement and Compliance Assurance, EPA, January 1, 2015, to the present.
2. All records comprising of any data regarding the public health or environmental impact of tampering defeat devices that is related to issuance EPA's CAA Title II Vehicle & Engine Civil Penalty Policy dated January 2021 (Jan 2021 Penalty Policy).
3. All records of internal or external records related to guidance or training (except (a) enforcement case-specific records not otherwise included in publicly filed administrative proceedings; and (b) records constituting drafts or regarding pre-decisional deliberations in developing such guidance or training) regarding calculating penalties using the January 2021 Penalty Policy, including records in publicly filed administrative proceedings.
4. For any judicial or administrative enforcement case involving Clean Air Act Section 203(a)(3) claims, all records comprising penalty calculations presented or filed in the course of a filed judicial or administrative proceeding applying the January 2021 Penalty Policy, and any final settlement document or decision including a penalty where EPA applied the January 2021 Penalty Policy.

5. All records of internal or external guidance, interpretations, enforcement policies, penalty policies, presentations (including PowerPoint presentations, speeches, and handouts), testimony, reports, articles, fact sheets, and any other materials generated, published, broadcast or presented by EPA or its representatives (except (a) enforcement case-specific records not otherwise included in publicly-filed administrative proceedings; (b) records constituting drafts or regarding pre-decisional deliberations in developing such materials) concerning:
 - The definition of “motor vehicle” as the term is used in Clean Air Act Section 203(a), 42 U.S.C. Sec. 7522(a);
 - Applicability of Clean Air Act Section 203(a), 42 U.S.C. Sec. 7522(a) to competition or racing use vehicles, including:
 - Interpretations of “where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use”;
 - Interpretations of “intended for use with, or as part of”; and
 - Interpretation of “motor vehicle” in 40 C.F.R. Section 85.1703 including the following phrases:
 - “features customarily associated with safe and practical street or highway use”;
 - “features which render its use on a street or highway unsafe, impractical, or highly unlikely.”
6. All records describing how the Administrator and the Attorney General determined that the EPA enforcement proceeding against Keystone Automotive Operations, Inc. Docket No. CAA-03-2021-0058, was appropriate for administrative penalty assessment in an amount over \$200,000 (increased for inflation to \$390,092) under 42 U.S.C. Sec. 7524(c)(1) and 40 C.F.R. Sec. 19.4, and any guidance, policies or practices relied upon in making such determinations.
7. All records related to compliance assistance, guidance, or advice with respect to applicability of Clean Air Act Section 203(a), 42 U.S.C. Sec. 7522(a) to competition or racing use vehicles including any guidance or assistance in providing parts to competition or racing use vehicles (except (a) enforcement case-specific records not otherwise included in publicly-filed administrative proceedings; and (b) records constituting drafts or regarding pre-decisional deliberations in developing such materials).
8. All records discussing differences between the 2009 Penalty Policy and the 2021 Penalty Policy (except (a) enforcement case-specific records not otherwise included in publicly filed administrative proceedings; and (b) records constituting drafts or regarding pre-decisional deliberations in developing such materials).

The Agency provided an interim response to your request on May 18, 2022. In addition, the Agency has concluded its search for records responsive to your request and is providing a portion of the requested records. Including the interim and this final production, the Agency has produced 79 electronic records that are responsive to your request. In addition, in the interim response of May 18, 2022, the Agency provided a listing of 32 separate weblinks or Federal Register citations to Agency records that are responsive to your FOIA request and that are publicly available on the Internet or the Federal Register.

One of the records being produced today is redacted. The basis for the redaction is Exemption 4 of the FOIA. Exemption 4 of the FOIA protects documents that may contain “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” 5 U.S.C. § 552(b)(4).

The Agency is withholding in full 67 electronic records that are responsive to your request. Among these electronic records, the EPA is withholding these records on the basis of Exemption 5 of the FOIA. Exemption 5 of the FOIA exempts from disclosure information that would not be available to another party in litigation. § 552(b)(5). This includes information subject to the deliberative process privilege (internal, pre-decisional, and deliberative information which would harm Agency decision making if released), attorney-client privilege (confidential communications between an attorney and client concerning legal advice), and attorney work product privilege (documents prepared by or at the direction of an attorney in anticipation of litigation). Additionally the Agency is withholding 46 of these records on the basis of Exemption 7(A) of the FOIA, Exemption 7(A) of the FOIA protects “records or information compiled for law enforcement purposes” that “could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552 (b)(7)(A). The EPA has considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

As noted above, the Agency has determined that some information responsive to your request may contain trade secrets or commercial or financial information which is exempt from disclosure under 5 U.S.C. § 552(b)(4). Pursuant to 40 C.F.R. § 2.204(d)(1), your request is initially denied with respect to these portions of records, and the EPA must undergo a confidential business determination to determine whether or not the initially withheld information may be disclosed. If you are interested in the EPA pursuing this confidential business information determination, please request a determination within 90 calendar days from the date of this letter. The EPA will consult with the third parties in connection with their business confidentiality claims and then issue a final determination. You may request a determination through any of the channels described below for communicating an appeal, or you may do so in the same communication as an appeal.

This information has been made available to you under the provisions of the FOIA, 5 U.S.C. § 552 and Agency regulation, 40 C.F.R. Part 2. Section 2.107 of the aforementioned regulation authorizes the assessment of a fee to cover the search, review, and reproduction cost incurred by the Environmental Protection Agency in complying with information requests where the total cost to the Agency exceeds \$25.00. Enclosed with this letter is a bill and invoice for \$xxxxxxx which is the fee assessed for the response to your request along with payment instructions.

This letter concludes our response to your request. If you would like to pursue a confidentiality determination for information initially withheld under 5 U.S.C. § 552(b)(4), please indicate your interest

in doing so within 90 calendar days. To the extent you would like to appeal any other issue, including any non-552(b)(4) withholdings, you may appeal this response by email at hq.foia@epa.gov, or by mail to the EPA's National FOIA Office, U.S. EPA, 1200 Pennsylvania Avenue, N.W. (2310A), Washington, DC 20460 or through FOIAonline if you are an account holder. If you are submitting your appeal by hand delivery, courier service, or overnight delivery, you must address your correspondence to 1200 Pennsylvania Avenue, N.W., WJC-N Building, Room 7309C, Washington, DC 20460.

If you need any further assistance or would like to discuss any aspect of your request, you may seek assistance from EPA's FOIA Public Liaison at hq.foia@epa.gov or call (202) 566-1667. You may also seek assistance from the Office of Government Information Services (OGIS). You may contact OGIS in any of the following ways: by mail, Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740-6001; email: ogis@nara.gov; telephone: (202) 741-5770 or (877) 684-6448; or fax: (202) 741-5769.

If you have any questions concerning this response, please contact Mark Palermo of my staff at (202) 564-8894 or palermo.mark@epa.gov.

Sincerely,

Caitlin Meisenbach, Acting Chief
Vehicle, Engine and Enforcement Branch
Air Enforcement Division

Enclosures